No. 14775

In the United States Court of Appeals for the Ninth Circuit

ELMER J. THOMPSON AND HELEN H. THOMPSON,
PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITIONS FOR REVIEW OF THE DECISIONS OF THE TAX COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

H. BRIAN HOLLAND,
Assistant Attorney General.
ELLIS N. SLACK,
A. F. PRESCOTT,
STANLEY P. WAGMAN,
Attorneys,
Department of Justice,
Washington 25, D. C.

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OPINION BELOW

The memorandum opinion of the Tax Court (R. 34-39) is not reported officially.

JURISDICTION

These petitions for review (R. 42-45, 45-A-45-D) involve federal income tax for the taxable year 1949. On November 17, 1952, the Commissioner mailed to the taxpayers notices of deficiency in the total amount of $300. (R. 7-10, 28-32.) Within ninety days thereafter and on February 2, 1953, the taxpayers filed petitions with the Tax Court for a redetermination of those deficiencies under the provisions of Section 272 of the

Internal Revenue Code of 1939. (R. 1-20, 22-32.) The decisions of the Tax Court sustaining the deficiencies were entered on January 10, 1955. (R. 40, 41.) The case is brought to this Court by petitions for review filed April 7, 1955. (R. 42-45, 45-A-45-D.) Jurisdiction is conferred on this Court by Section 7482 of the Internal Revenue Code of 1954.

QUESTIONS PRESENTED

1. Did the taxpayers suffer a bad debt, within the meaning of Section 23(k)(4) of the Internal Revenue Code of 1939, as a result of their transaction with Jack Miller?

2. If the taxpayers suffered the alleged bad debt, *in what year did it occur?*

STATUTE AND REGULATIONS INVOLVED

Internal Revenue Code of 1939:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

* * * * *

(e) *Losses by Individuals.*—In the case of an individual, losses sustained during the taxable year and not compensated for by insurance or otherwise—

(1) if incurred in trade or business; or

(2) if incurred in any transaction entered into for profit, though not connected with the trade or business; * * *

(k) [As amended by Sec. 124(a) of the Revenue Act of 1942, c. 619, 56 Stat. 798, and Sec. 113(a) of

the Revenue Act of 1943, c. 63, 58 Stat. 21] *Bad Debts.*—

(1) *General rule.*—Debts which become worthless within the taxable year; * * * and when satisfied that a debt is recoverable only in part, the Commissioner may allow such debt, in an amount not in excess of the part charged off within the taxable year, as a deduction. This paragraph shall not apply * * * with respect to a debt evidenced by a security as defined in paragraph (3) of this subsection. This paragraph shall not apply * * * with respect to a non-business debt, as defined in paragraph (4) of this subsection.

* * * * *

(3) *Definition of securities.*—As used in paragraphs (1), (2), and (4) of this subsection the term "securities" means bonds, debentures, notes or certificates, or other evidences of indebtedness, issued by any corporation (including those issued by a government or political subdivision thereof), with interest coupons or in registered form.

(4) *Non-business debts.*—In the case of a taxpayer, other than a corporation, if a non-business debt becomes worthless within the taxable year, the loss resulting therefrom shall be considered a loss from the sale or exchange, during the taxable year, of a capital asset held for not more than 6 months. The term "non-business debt" means a debt other than a debt evidenced by a security as defined in paragraph (3) and other than a debt the loss from the worthlessness of

which is incurred in the taxpayer's trade or business.

* * * * *

(26 U.S.C. 1952 ed., Sec. 23.)

SEC. 117. CAPITAL GAINS AND LOSSES.

* * * * *

(e) [As amended by Sec. 150 (c) of the Revenue Act of 1952, *supra*] *Capital Loss Carry-Over.*—

(1) *Method of computation.*—If for any taxable year beginning after December 31, 1941, the taxpayer has a net capital loss, the amount thereof shall be a short-term capital loss in each of the five succeeding taxable years to the extent that such amount exceeds the total of any net capital gains of any taxable years intervening between the taxable year in which the net capital loss arose and such succeeding taxable year. * * *

* * * * *

(26 U.S.C. 1952 ed., Sec. 117.)

SEC. 322. REFUNDS AND CREDITS.

* * * * *

(b) *Limitation on Allowance.*—

(1) *Period of limitation.*—Unless a claim for credit or refund is filed by the taxpayer within three years from the time the return was filed by the taxpayer or within two years from the time the tax was paid, no credit or refund shall

be allowed or made after the expiration of whichever of such periods expires the later. If no return is filed by the taxpayer, then no credit or refund shall be allowed or made after two years from the time the tax was paid, unless before the expiration of such period a claim therefor is filed by the taxpayer.

* * * * *

(5) [As added by Sec. 169(a) of the Revenue Act of 1942, *supra,* and amended by Sec. 5(a) of the Tax Adjustment Act of 1945, c. 340, 59 Stat. 517] *Special period of limitation with respect to bad debts and worthless securities.*—If the claim for credit or refund relates to an overpayment on account of—

(A) the deductibility by the taxpayer, under section 23 (k)(1), section 23 k)(4), * * *, of a debt as a debt which became worthless, * * *, or

(B) the effect that the deductibility of a debt or loss described in subparagraph (A) has on the application to the taxpayer of a carry-over,

in lieu of the three-year period of limitation prescribed in paragraph (1), the period shall be 7 years from the date prescribed by law for filing the return for the year with respect to which the claim is made. * * *

* * * * *

(26 U.S.C. 1952 ed., Sec. 322.)

Treasury Regulations 111, promulgated under the Internal Revenue Code of 1939:

> SEC. 29.23(k)-1 [As amended by T. D. 5376, 1944 Cum. Bull. 119, 121]. *Bad debts.*— * * *
>
> * * * * *
>
> (b) If, from all the surrounding and attending circumstances, the Commissioner is satisfied that a debt is partially worthless, the amount which has become worthless, to the extent charged off during the taxable year, shall be allowed as a deduction in computing net income. * * *
>
> Where the surrounding circumstances indicate that a debt is worthless and uncollectible and that legal action to enforce payment would in all probability not result in the satisfaction of execution on a judgment, a showing of these facts will be sufficient evidence of the worthlessness of the debt for the purpose of deduction. Bankruptcy is generally an indication of the worthlessness of at least a part of an unsecured and unpreferred debt. * * *
>
> * * * * *
>
> (d) The provisions of subsections (*a*) and (*b*) of this section apply to all taxpayers, except that (1) they do not apply in the case of a taxpayer, other than a corporation, with respect to a nonbusiness debt as defined in paragraph (4) of section 23(k) of the Code; (2) no deduction on account of worthlessness shall be allowed with respect to any debt of the type enumerated in section 23(k)(5) of the Code which is recoverable

only in part; and (3) in the case of taxpayers other than banks as defined in section 104, the term "debts" as used in such subdivisions means obligations to pay fixed or determinable sums of money which are not evidenced by securities as defined in section 29.23(k)-4.

SEC. 29.23(k)-6. *Non-Business Bad Debts.*— In the case of a taxpayer, other than a corporation, if a non-business bad debt becomes entirely worthless within a taxable year beginning after December 31, 1942, the loss resulting therefrom shall be treated as a loss from the sale or exchange of a capital asset held for not more than six months. Such a loss is subject to the limitations provided in section 117 with respect to gains and losses from the sale and exchange of capital assets. A loss with respect to such a debt will be treated as sustained only if and when the debt has become totally worthless, and no deduction shall be allowed for a non-business debt which is recoverable in part during the taxable year. Nor are the provisions of this subdivision applicable in the case of a loss resulting from a security as defined in section 23(k)(3). A non-business debt is a debt, other than a debt the loss from the worthlessness of which is incurred in the taxpayer's trade or business and other than a debt evidenced by a security as that term is defined in section 23(k)(3). * * *

* * * * *

STATEMENT

The following, substantially as contained in the Tax Court's memorandum opinion (R. 34-39), are the facts found by the court below upon the basis of the stipulation of facts (R. 34, 46-47) and (R. 35-37) from the testimony adduced at the hearing:

On or about July 10, 1945, Elmer J. Thompson, taxpayer herein, purported to enter into a limited partnership agreement with Jack Miller, to be known by the name "Miller Mining Company", for the purpose of engaging in a mining business in Arizona, by signing a purported limited partnership agreement, such agreement providing that the taxpayers were to receive a one-eighth interest in and to all of the profits of the partnership. On or about December 12, 1945, Thompson purported to acquire an additional one-eighth interest in the limited partnership by signing another written agreement. Thompson advanced to Jack Miller, in reliance upon and in accordance with the provisions of the purported limited partnership agreement, the total sum of $14,700 (R. 34), on the dates and in the amounts set forth below (R. 35):

Date of Check	Type of Check	Amount of Check
February 6, 1945	Taxpayer's Personal	$1,500.00
August 6, 1945	Taxpayer's Personal	1,000.00
August 13, 1945	Taxpayer's Personal	1,500.00
October 29, 1945	Taxpayer's Personal	2,500.00
December 14, 1945	Bank Cashier's Check	6,000.00
March 7, 1946	Bank Cashier's Check	1,500.00
April 6, 1946	Bank Cashier's Check	700.00
	Total	$14,700.00

No certificate of limited partnership for the purported limited partnership was ever executed by the

taxpayers, and none was filed with the Clerk of Los Angeles County. (R. 35.) No permit authorizing the sale and issuance of securities was ever issued by the Department of Investment, Division of Corporations, State of California, to Jack Miller and/or Miller Mining Company to and including May 21, 1954. (R. 36.)

In the summer of 1946, Thompson made a trip to Kingman, Arizona. Miller conducted him through two mines which he represented to him were their mining property and in these mines men were working, mining equipment was in evidence and actual mining of gold operations was being carried on. Thompson has never visited the mining site since. He never took any steps to verify Miller's title to the property. (R. 36-37.)

Thompson received no financial reports of any kind from the operations of the mining venture or copies of any partnership tax returns. He did receive a written report or reports that there were some sales of ore by Jack Miller to the Kennecott Copper Company. The only other reports Thompson received were verbal assurances from Miller that the project was going well and that the profits were foreseeable. The taxpayers were furnished information in 1947 by Jack Miller with respect to three allegedly then existing mines. (R. 35-36.)

Thompson does not know whether the mine is still operating. He never received any return of money from Miller nor any funds representing profits from the mining venture. He does not know whether or not his funds were ever in fact invested in the mining venture. His last contact with Jack Miller was some time near the middle of the year 1947. (R. 36-37.)

On the above facts, each taxpayer asked approval of

a deduction of a bad debt in the amount of $1,000 for the year 1949. (R. 37.) The Commissioner disallowed the deductions and the Tax Court sustained his determinations. (R. 38.)

SUMMARY OF ARGUMENT

I. The record fails to support the taxpayers' claim that a "debt" was ever created or existed between themselves and Miller in the sense that that term is used in Section 23(k) of the Internal Revenue Code of 1939 which grants a deduction for "Bad Debts". The taxpayers admit that the advances were made under purported partnership agreements under which they obtained a one-fourth interest in a mining venture which proved unsuccessful. Their contention that this interest was transmuted into a debt because of failure to comply with state law is without merit. At best, their argument is that because of failure to file a certificate of limited partnership a right of action against Miller resulted. This, we submit, is no transmuted debt under the federal statute. But, further, there is no showing that any right of action accrued against Miller for the moneys paid for the one-fourth interest, merely because of failure to file the certificate. There is no showing of fraud, or damage because thereof. There is no showing that the funds were not used for the purposes intended, and no showing that the taxpayers would not have enjoyed their full one-fourth share of any profits had there been profits.

II. Furthermore, the taxpayers have not even attempted to answer the question—"If they suffered a 'bad debt', in what year did it actually become worthless?" They have not answered this question because they cannot. They bore the burden of proof, and there

is no proof, either that the alleged debt had any value at the beginning of the taxable year or that it actually became worthless in any particular year prior to 1949.

ARGUMENT

The "loss" and "bad debt" provisions of the Internal Revenue Code of 1939 are mutually exclusive. *Spring City Co.* v. *Commissioner,* 292 U.S. 182; *Inman-Poulsen Lumber Co.* v. *Commissioner,* 219 F. 2d 159, 162 (C.A. 9th). The taxpayers do not claim the deduction as a loss in 1949, which would require a showing that their investment became worthless in 1949. Section 23(e) of the 1939 Code, *supra.* In fact they admitted in the Tax Court that the item "probably became bad sometime near the middle of the year 1947". (R. 37-38.)

On the contrary, the taxpayers pitched their case on the grounds that the item involved was a non-business bad debt. In so doing they made no attempt to prove the particular year in which the asserted bad debt became worthless. It is true that if they had established that the item was a non-business bad debt *and* that such debt became worthless in a particular year, they would have been entitled to carry a short-term capital loss forward to each of five succeeding years to be applied against net capital gains by virtue of Sections 23(k)(4) and 117(e)(1) of the 1939 Code, *supra.*

However, we submit that the mere fact that such a "loss" may be spread over a five-year period would not relieve the taxpayers of their burden of proving the particular year in which it occurred.

I

There Was Never Any "Debt" Created or Existing Between the Taxpayers and Miller

A. *There was no debt within the purview of Section 23(k) of the Internal Revenue Code of 1939*

To overcome the Commissioner's determination, the taxpayers first had to prove that their association with Miller was not that of limited partner, or outfitter, or grubstaker in a mining venture for profit, but was, instead, that of creditor in a personal loan transaction, detached from and without interest in the mining venture. Section 23(k)(4), 1939 Code.

However, the taxpayers admitted in their petitions in the Tax Court that they "purported to enter into a limited partnership agreement with Jack Miller, for the purpose of engaging in the mining business in Arizona"; and that they "advanced money to the said Jack Miller", "Acting upon the belief that a valid limited partnership had been entered into". (R. 2, 3, 23, 24; Ex. B, C, R. 11, 16.) They do not now deny that this was their subjective intent.[1] There is no showing that if the venture had been successful the taxpayers would have been entitled to less than one-fourth of the profits therefrom. There is no showing that the tax-

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[1] At no time during the proceedings below was there any claim of fraud or a shred of evidence directed toward such proposition. There is not the slightest intimation in Judge Van Fossan's opinion that this could have been the case. Certainly there can be no merit or validity in the taxpayers' coming in at this late stage in the proceedings and merely reciting that there "may be sufficient fraud" for recovery under California law. (Br. 20.) *Inman-Poulsen Lumber Co.* v. *Commissioner*, 219 F. 2d 159, 162 (C.A. 9th). In any event, there is no showing that the taxpayers acquired even a right of action against Miller.

payers were entitled to recover their investment merely because the venture proved unsuccessful.

A debt, and accordingly the right to deduct its worthlessness, for federal tax purposes, is a transaction between parties intending to create *ab initio* a loan or credit situation—i.e., debtor-creditor relationship in the ordinary sense—and rests upon the existence of an unconditional obligation or guarantee to repay the amount of the money advanced or credit extended. *Inman-Poulsen Lumber Co.* v. *Commissioner,* 219 F. 2nd 159, 161 (C.A. 9th); *Kanne* v. *American Factors,* 190 F. 2d 155 (C.A. 9th); *Alexander & Baldwin* v. *Kanne,* 190 F. 2d 153 (C.A. 9th); *San Joaquin Brick Co.* v. *Commissioner,* 130 F. 2d 220 (C.A. 9th); *Earle* v. *W. J. Jones & Son,* 200 F. 2d 846 (C.A. 9th); *Russell Box Co.* v. *Commissioner,* 208 F. 2d 452 (C.A. 1st); *Bercaw* v. *Commissioner,* 165 F. 2d 521 (C.A. 4th); *Allen-Bradley Co.* v. *Commissioner,* 112 F. 2d 333 (C.A. 7th); *Commissioner* v. *O. P. P. Holding Corp.,* 76 F. 2d 11 (C.A. 2d); *Milton Bradley Co.* v. *United States,* 146 F. 2d 541 (C.A. 1st); *Spreckels* v. *Commissioner,* decided January 25, 1946 (1946 P-H T.C. Memorandum Decisions, par. 46,025). The taxpayers' argument is not that they intended to establish a debtor-creditor relationship *ab initio* by virtue of their purported limited partnership agreement or joint venture in the mining business, but rather that such joint venture, or grubstake, or limited partnership arrangement somehow "became that of debtor and creditor". (R. 4, 25.)

The taxpayers' argument is based upon a misconception of the term "debt" as it is obviously intended to be used in the statute. The definition (Br. 20) upon which they rely is not a judicial one. It was culled out

of context from the opinion of the Board of Tax Appeals in *Henry* v. *Commissioner,* 8 B.T.A. 1089, 1097, wherein the Board itself did not apply such a broad definition in deciding the case. Instead the Board, having to distinguish between a "loss" and a "debt" because of seeming inconsistencies in the taxpayer's pleadings (p. 1097), in fact utilized the same definition of "debt" which we have shown above to be the one applicable for federal tax purposes. The Board made it clear that only existing obligations in the nature of contracts enforceable in actions *at law* come within the definition and not *"every* claim" upon which a judgment for a sum of money could be recovered in *"an*[*y*] action." (Italics supplied.) The Board went on to say (pp. 1097-1098):

> It is a general rule of law that so long as a partnership continues one partner can not maintain an action *at law* against the firm or against a copartner on account of matter connected with the partnership * * *.

The appellate court affirmed the Board's decision. *Henry* v. *Burnet,* 48 F. 2d 459 (C.A.D.C.).

The California cases cited by the taxpayers, as well as their citation from the American Law Reports (Br. 15-16), are bound up with *fraud* and the *trust-fund* theory of recovery against California blue-sky law violators.[2] Actionable fraud sounds in tort for wrong-

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[2] We wish to note at this point that there is no justification in fact or in law for the contention (Br. 10-16) that the written agreements entered into between the taxpayers and Miller (R. 11, 16) were illegal security transactions within the intendment of the California "blue-sky" law. *People* v. *Woodson,* 78 Cal. App. 2d 132, 177 P. 2d 586, cited by the taxpayers (Br. 12), gives us a good idea of what the California courts actually hold to be the

ful conversion of property, not in contract for debt. *Graner* v. *Hoysett,* 84 Cal. App. 2d 657, 191 P. 2d 497; *Woods* v. *Deck,* 112 F. 2d 739 (C.A. 9th); and *Becker* v. *Stineman,* 115 Cal. App. 740, 2 P. 2d 444, cited by the taxpayers (Br. 15), all involve the *fraudulent* sale of securities.[3] *In re Builders' Finance Ass'n,* 26 F. 2d

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issuance of "partnership securities", and how far removed such a situation is from the present case. In that case, in each of the four separate violations involved, there was the *fraudulent* issuance of *personal promissory* notes as *collateral for repayment* along with the certificate of limited partnership, in reliance upon which personal guarantees the investment was consummated. In the instant case, as we have noted, there was never any claim of fraud before the court below, and there was no such personal obligation assumed by Miller. The written agreements between the taxpayers and Miller do not even fall within the statutory definition of a "security". (Pet. Br. 10.) The cases decided under Section 25008 of Deering's California Corporations Code Annotated Title 4, c. 1 (Pet. Br. 10-11) do not have any bearing, even for the sake of argument, upon the decision of this case. There is no such "certificate of interest in a * * * mining title or lease" involved herein. The arrangement, although limited in certain aspects, was a joint venture for the purpose of "engaging in the mining business". (R. 16.) The taxpayers did not even know how many claims Miller had or could work. (Tr. 34.) The arrangement was never limited to any specific title or lease. Furthermore, this particular arrangement is expressly excepted in Section 25100 of Deering's California Corporations Code Annotated, Title 4, c. 2, Article 1 (Pet. Br. 11-12) from coverage under the blue-sky laws. They do not apply to "Any partnership interest * * * in a limited partnership where certificates are executed, filed, and recorded * * * except partnership interests when offered to the public." We will show hereinafter that, consistent with California statute and case law, Miller's failure to file a formal certificate does not have any bearing upon this case. Also, there was no public offering.

[3] We should also note that if the taxpayers ever successfully recovered a judgment based upon actionable fraud, making themselves whole, the proceeds would likely not even constitute taxable income, whereas any future bad-debt recovery would. See *Commissioner* v. *Glenshaw Glass Co.,* 348 U.S. 426, rehearing denied, 349 U.S. 925; *Commissioner* v. *William Goldman Theatres, Inc.,* 348 U.S. 426, rehearing denied, 349 U.S. 925; *Gen. Investors Co.* v. *Commissioner,* 348 U.S. 434.

123 (S.D. Cal.), cited by the taxpayers (Br. 16), is even further afield—involving the question of how little assets a corporation had, not how great was its liability to persons who illegally purchased stock. Since there was no duty upon Miller to repay the taxpayers the sum of money invested, or, for that matter, any sum at all, an action of "debt" would not lie in this case. *Raborg* v. *Peyton,* 2 Wheat. 385; cf. *Henry* v. *Commissioner,* 8 B.T.A. 1089, affirmed, 48 F. 2d 459 (C.A.D.C.); *Miller* v. *Robertson,* 266 U. S. 243, 249-250.

Thus, the taxpayers have failed to establish a bad debt deduction. Where the clear intendment of the taxpayers was to make an investment for profit, they will not be heard to claim they merely made a loan. *Root* v. *Commissioner,* 220 F. 2d 240 (C. A. 9th).

B. *There was no debtor-creditor relationship under California law*

It is axiomatic that the validity of a bad debt deduction for purposes of federal income taxation is a federal question. This Court has decided such questions any number of times. *Inman-Poulsen Lumber Co.* v. *Commissioner,* 219 F. 2d 159; *Elko Lamoille Power Co.* v. *Commissioner,* 50 F. 2d 595; *San Joaquin Brick Co.* v. *Commissioner,* 130 F. 2d 220; *Earle* v. *W. J. Jones & Son,* 200 F. 2d 846; *Root* v. *Commissioner,* 220 F. 2d 240. See, also, H. Rep. No. 2333, 77th Cong., 2d Sess., pp. 44-45, 76 (1942-2 Cum. Bull. 372, 408-409, 431); S. Rep. No. 1631, 77th Cong., 2d Sess., pp. 89-90 (1942-2 Cum. Bull. 504, 572-573). Although the California statutes and the decisions of California state courts would not control this Court's decision of the questions here

involved, we have, nevertheless, examined the California cases and statutes and find nothing to contradict the decision below that the taxpayers failed to establish the existence of a personal debtor-creditor relationship with Miller.

The grubstake, or outfitting, or limited partner relationship between parties in a gold mining venture is a familiar one to the California courts. See 17 Cal. Jur., Sec. 115, p. 453. It is firmly established in their decisions that no debtor-creditor relationship is created, but rather a venture for profit. *Berry* v. *Woodburn,* 107 Cal. 504, 40 Pac. 802; *Moritz* v. *Lavelle,* 77 Cal. 10, 18 Pac. 803; *Gore* v. *McBrayer,* 18 Cal. 582; *Prince* v. *Lamb,* 128 Cal. 120, 60 Pac. 689.

Similarly, the express language of provisions of Deering's California Corporations Code, Title 2, Chapters 1 [4] and 2,[5] support the Tax Court's conclusion in

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[4] ARTICLE 2

Nature of Partnership.

Sec. 15006. *Partnership defined.* (1) A partnership is an association of two or more persons to carry on as co-owners a business for profit.

(2) * * * this Act shall apply to limited, special, and mining partnerships except insofar as the statutes relating to such partnerships are inconsistent herewith.

* * * * *

ARTICLE 4

Relations of Partners to One Another.

Sec. 15018. *Rules determining rights and duties of partners.* The rights and duties of the partners in relation to the partnership shall be determined, subject to any agreement between them, by the following rules:

(a) Each partner shall be repaid his contributions * * *.

(b) The partnership must indemnify every partner in respect of payments made * * * by him in the ordinary and

[Footnote 5 on page 18]

this case that no personal debtor-creditor relationship was created between the taxpayers and Miller. There is no personal debtor-creditor relationship between partners as regards their respective investments. Nor can a partner expect any exact amount—*viz.*, the specific sum invested—to be repaid. He can only look to a distribution of his aliquot share of the partnership assets. His interest is measured in terms of a percentage, not in fixed dollars and cents. See, also, *Gleason* v. *White,* 34 Cal. 258, for a judicial affirmation of these principles.

The law is clear—under Section 15502(b)(2) of Deering's California Corporations Code, Title 2, c. 2—that to establish a limited partnership *de jure* "substantial compliance" with the statute is necessary. *Russell* v. *Warner,* 96 Cal. App. 2d 986, 988, 217 P. 2d 43, 44. But the law is equally clear that insofar as the relations of would-be partners *inter se* are concerned, no partner can resort to a failure to substantially comply with the formal statutory requisites in order to rid himself of his obligations to the other partner or to third parties where the partnership has been established *de facto*. *Siebold* v. *Berdine,* 61 Cal. App. 158, 214 Pac. 655; *Russell* v. *Warner, supra.* The facts in this case would

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proper conduct of its business, and for the preservation of its business or property.

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ARTICLE 5

Property Rights of a Partner.

Sec. 15024. *Extent of property rights of a partner.* The property rights of a partner are (1) his rights in specific partnership property, (2) his interest in the partnership, and (3) his right to participate in the management.

[5] There are no provisions in Title 2, Chapter 2, Uniform Limited Partnership Act, inconsistent with the substantive provisions set forth in fn. 4, *supra,* relating to partnerships in general.

easily lend themselves to the conclusion, by the California courts, that a *de facto* partnership relation was established between the taxpayers and Miller. *Kaufman-Brown Potato Co.* v. *Long,* 182 F. 2d 594, 599 (C. A. 9th); *Stowe* v. *Merrilees,* 6 Cal. App. 2d 217, 44 P. 2d 368; *Niroad* v. *Farnell,* 11 Cal. App. 767, 106 Pac. 252; *Cal. Emp. Etc. Com.* v. *Walters,* 64 Cal. App. 2d 554, 149 P. 2d 17; *Westcott* v. *Gilman,* 170 Cal. 562, 150 Pac. 777; *Denning* v. *Taber,* 70 Cal. App. 2d 253, 160 P. 2d 900; *Kersch* v. *Taber,* 67 Cal. App. 2d 499, 154 P. 2d 934. Moreover, there was nothing to prevent the taxpayers themselves from filing the certificate of partnership. They have not shown that they were harmed by the filing defect. Besides, the filing requirement is no doubt directed toward the protection of subsequent parties. There is also no indication that any third party suffered. There is no showing that the moneys invested were not used for the purposes intended; and the venture proved unsuccessful.

II

Even If It Could be Held that a Debtor-Creditor Relationship Existed, There Is No Showing that it Became Worthless in 1949, Nor Any Showing of Any Particular Year in Which it Became Worthless

The taxpayers pose the question (Br. 5) "* * * in what year did the [bad debt] loss occur?", but do not attempt to answer it. They cannot answer it because there is no proof either that the debt had any value at the beginning of the taxable year or that it actually became worthless in a particular year prior to 1949, although they admit that it could have become entirely worthless in *some* prior year. (R. 37-38.) The burden was upon the taxpayers to establish this second vital

aspect of their case, and their failure to do so is fatal. *Lauriston Inv. Co.* v. *Commissioner,* 89 F. 2d 327 (C. A. 9th); *San Joaquin Brick Co.* v. *Commissioner,* 130 F. 2d 220 (C. A. 9th); *Capital Service, Inc.* v. *Commissioner,* 180 F. 2d 579 (C. A. 9th); *Henry* v. *Burnet,* 48 F. 2d 459 (C. A. D. C.); *Kentucky Rock Asphalt Co.* v. *Helburn,* 108 F. 2d 779 (C. A. 6th); *Cittadini* v. *Commissioner,* 139 F. 2d 29 (C. A. 4th); *Redman* v. *Commissioner,* 155 F. 2d 319 (C. A. 1st); *Rockefeller* v. *Nunan,* 142 F. 2d 354 (C. A. 2d), certiorari denied, 323 U. S. 732; H. Rep. No. 2333, 77th Cong., 2d Sess., pp. 44-45, 76 (1942-2 Cum. Bull. 372, 408-409, 431); S. Rep. No. 1631, 77th Cong., 2d Sess., pp. 89-90 (1942-2 Cum. Bull. 504, 572-573).

CONCLUSION

The Tax Court's decisions are correct and should be affirmed.

Respectfully submitted,

H. BRIAN HOLLAND,
Assistant Attorney General.
ELLIS N. SLACK,
A. F. PRESCOTT,
STANLEY P. WAGMAN,
Attorneys,
Department of Justice,
Washington 25, D. C.

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